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IN THE
Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NARAL PRO-CHOICE AMERICA FOUNDATION, ET AL., IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The NARAL Pro-Choice America Foundation, NARAL Pro-Choice America and the state-based affiliates and chapter of NARAL Pro-Choice America (collectively, "NARAL Pro-Choice America") are organizations that work through the legislative process, in Congress and in the states, to secure policies that reduce unintended pregnancy and the need for abortion, while ensuring access to the full range of reproductive health services and safeguarding the constitutional right to privacy.[2] NARAL Pro-Choice America tracks state and federal legislation, writes reports and amicus briefs, educates the public, serves as a legislative consulting service, and organizes citizens and legislators to protect the freedom to choose. Our work nationally and in the states, and our annual publication Who Decides? The Status of Women's Reproductive Rights in the United States (formerly, A State-by-State Review of Abortion and Reproductive Rights), informs this brief.

SUMMARY OF ARGUMENT

The government and its *amici* appear to be using at least two strategies to eviscerate the right to abortion. First, they urge the Court to engage in judicial legislation to save an unconstitutional statute, rather than simply invalidating it, by adding a judicial gloss that plainly contravenes Congress's intent to challenge the Court's prior decisions. Second, they seek to prevent effective judicial review of unconstitutional restrictions on abortion by advocating a new, more stringent standard for challenges to statutes as unconstitutional on their

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amici*, its members, and its counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been filed with the Clerk of the Court.

[2] For a complete list of NARAL Pro-Choice American affiliates and chapter that have signed onto this brief, *see* Additional *Amici*, *infra*.

face. The Court should reject these efforts to save the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003) ("Partial-Birth Abortion Ban Act" or "Act"), and declare it unconstitutional and unenforceable under this Court's clear precedents.

The government is wrong to assert that if the Court finds the Act facially unconstitutional, the Court should not invalidate the entire statute, but rather should take on the role of the legislature in rewriting the Act. The Court should reject this invitation to step outside its traditional judicial role. As explained below, the constitutional flaws in the Act are fundamental and pervasive and reflect deliberate choices by Congress. Congress specifically chose not to include an exception necessary to protect the health of the woman, as required by this Court's precedents. Similarly, Congress chose to invent a nonmedical definition of so-called "partial-birth" abortion[3] that includes abortion procedures that may not be banned under the Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). In light of Congress's deliberate choices, any "narrowing" construction or judicial gloss engrafting a health exception onto the Act, or rewriting its definition of the acts prohibited as a "partial-birth" abortion, would involve the Court in a legislative function well beyond its institutional adjudicative role. Such a usurpation of legislative functions would violate fundamental separation of powers principles.

There is similarly no merit to the government's suggestion, in *Gonzales v. Carhart*, No. 05-380, the companion case to this one, that *United States v. Salerno*, 481 U.S. 739 (1987), provides the default analysis for all

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[3] "Partial-birth" abortion is a medically meaningless oxymoron. As the district court in this case noted: "The term 'partial-birth abortion' . . . is neither recognized in the medical literature nor used by physicians who routinely perform second trimester abortions." *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 964 (N.D. Cal. 2004). The term is used here only because it is the language Congress used.

facial constitutional challenges, including facial challenges to laws restricting abortion. The government seems to have abandoned that argument in this case; *amici* agree that *Salerno* is inapplicable and need not be addressed here. Should the Court reach the issue, it should reject the government's suggestion that certain language in *Salerno* should be applied to facial challenges to laws restricting abortion. Adopting *Salerno* would overturn the well-established law of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and its progeny. Adopting *Salerno* would also practically preclude facial challenges to statutes restricting abortion, forcing almost all future challenges to be brought as as-applied challenges. Such a change, forcing case-by-case review, would as a practical matter preclude meaningful, effective judicial review and relief for millions of women affected by laws restricting abortion. Adopting *Salerno* as the general standard would also not only overturn well-established jurisprudence in the right to abortion context, it would also wipe away a large range of precedent in other areas of constitutional law. *Salerno* never has been, and should not become, the general rule for facial challenges.

ARGUMENT

I. THE ONLY APPROPRIATE REMEDY FOR THE MULTIPLE CONSTITUTIONAL FLAWS OF THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003 IS TO INVALIDATE THE ENTIRE STATUTE.

The constitutional infirmities of the Partial-Birth Abortion Ban Act require that the entire Act be stricken as unconstitutional. The statute lacks a health exception; it is overbroad; and it is vague. Each of these flaws, standing alone, requires total invalidation. Their cumulative impact presents a particularly compelling case for full invalidation.

A. The Act's Unconstitutional Lack Of A Health Exception Requires Full Facial Invalidation.

The lack of a health exception renders the Act unconstitutional and requires complete invalidation. The Court has made it abundantly clear that the government may not restrict access to abortions that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *see also Casey*, 505 U.S. at 880 ("the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). To guarantee protection against infringement of the right, "the law requires a health exception in order to validate even a post-viability abortion regulation." *Stenberg*, 530 U.S. at 930. The Court has found that a statute restricting so-called "partial-birth" abortions that lacks a health exception is unconstitutional. *See id.*

Respect for the distinct roles of the legislature and judiciary requires total invalidation of the Act based on its lack of a health exception. The Congressional Record clearly indicates that adding a health exception would contravene Congress's express legislative intent rejecting a health exception. Fashioning a "narrower" remedy by adding a health exception would not only be paradoxical, it would involve the Court in a legislative function incompatible with its judicial role. In contrast, invalidating the Act would allow Congress to decide whether to change course and amend the Act to add a health exception.

1. Any remedy narrower than invalidation would violate Congressional intent.

A narrow remedy to correct laws restricting abortion that unconstitutionally omit a health exception is permissible only where such a narrow remedy would be preferred by the

legislature to full invalidation of the statute. *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 968 (2006). "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'"[4] *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring and dissenting in part)). When a portion of a statute is unconstitutional, the Court must inquire as to whether "the legislature [would] have preferred what is left of its statute to no statute at all." *Ayotte*, 126 S. Ct. at 968.

The statutory language and the Congressional Record make clear that Congress affirmatively and repeatedly rejected any inclusion of a health exception in the Act and would prefer no Act to one including such an exception. The Court should therefore affirm the Ninth Circuit's decision in *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), striking down the Act in its entirety.

Congress indisputably was aware of the Act's constitutionally fatal lack of a health exception when it passed the Act. In *Stenberg*, the Court recognized that "a statute that altogether forbids the use of intact dilation and extraction ("D&X") creates a significant health risk" and struck down a law restricting so-called "partial-birth" abortion because the law lacked a health exception. *Stenberg*, 530 U.S. at 938. Numerous members of Congress

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[4] In *Ayotte*, the Court remanded for further exploration of legislative intent because of the sparse legislative record supporting the state statute. 126 S. Ct. at 969. Here, as the government has recognized, the Congressional Record of the Act contains abundant evidence of legislative intent. Pet'r Br. at 3 ("After years of hearings and debates, Congress passed, and the President signed, the Partial-Birth Abortion Ban Act of 2003."); Pet'r Br. at 2, *Carhart*, No. 05-380 ("Congress passed the Act after conducting nine years of hearings and debates, after carefully considering this Court's precedents, and after making extensive findings based on the substantial testimony that it had received."). Unlike in *Ayotte*, there can be no dispute as to Congress's intent in passing the Act.

issued statements highlighting the Act's constitutional infirmities. *See, e.g.*, 149 Cong. Rec. S3560, S3601 (2003) (statement of Sen. Feinstein); 149 Cong. Rec. S3560, S3576 (2003) (statement of Sen. Mikulski); 149 Cong. Rec. H4922, H4926 (2003) (statement of Rep. Nadler). Congress disregarded these warnings of constitutional infirmity and refused to incorporate a health exception in the Act.

The record makes clear not only that Congress understood the requirements announced in *Stenberg*, but also that it sought to enact a law that omitted a health exception and thereby challenged the Court's *Stenberg* ruling. Senator Santorum, the Act's lead sponsor in the Senate, stated:

> We are here because the Supreme Court defended the indefensible [in *Stenberg*] . . . . We have responded to the Supreme Court. I hope the Justices read this Record because I am talking to you . . . . [T]here is no reason for a health exception.

149 Cong. Rec. S3456, S3486 (2003) (statement of Sen. Santorum).

Congress tried to avoid the impact of *Stenberg's* holding that a health exception was required to a statute that forbade D&X by creating purported "legislative findings" that no such exception was required. Thus, Congress proclaimed that "partial-birth abortion" is "never medically necessary and should be prohibited." Partial-Birth Abortion Ban Act § 2(1). The Act also stated that no health exception was required, because:

> There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a "health" exception, because the facts indicate that a partial-birth abortion is *never* necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard medical care.

Partial-Birth Abortion Ban Act § 2(13) (emphasis added). Congress asserted that a "moral, medical and ethical consensus" exists on this issue. *Id.* § 2(1).

But both the statutory language and the record amassed by Congress plainly undermine these assertions.[5] The Congressional Record itself indicates that there was evidence that in some cases, so-called "partial-birth" abortions were necessary to protect the health of the woman. *See, e.g., Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 830 (D. Neb. 2004).

The Act itself acknowledges that a "prominent medical association" concluded that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "*there is no consensus* among obstetricians about its use." Partial-Birth Abortion Ban Act § 2(14)(C) (emphasis added).[6] Three circuit courts that have reviewed the same Congressional Record and trial evidence have found that no consensus exists that a "partial-birth" abortion is never necessary to protect the health of the woman. *Nat'l Abortion Fed'n, v. Gonzales,* 437 F.3d 278, 287 (2d Cir. 2006) ("We also conclude, on a court record and a congressional hearing record even more compelling than the record on which the Supreme Court ruled in *Stenberg*, that substantial medical opinion does support the view that the procedure might sometimes be necessary to avoid risks to the mother's health if an alternative procedure is used."); *Planned Parenthood Fed'n*, 435 F.3d at 1175-76 ("[W]e are compelled to conclude, on the basis of the record before Congress, of the congressional findings themselves, and of evidence introduced in the district court, that a substantial

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[5] Plaintiffs in this case and in *Carhart v. Ashcroft* also submitted trial evidence that the "partial-birth" abortion procedure was necessary to protect the health of the woman. *Carhart*, 331 F. Supp. 2d at 923-29; *Planned Parenthood Fed'n*, 320 F. Supp. 2d at 982-84, 987-89.

[6] The Ninth Circuit identified this medical association as the American Medical Association. *Planned Parenthood Fed'n*, 435 F.3d at 1174.

disagreement exists in the medical community regarding whether those procedures are necessary in certain circumstances [to preserve the health of women]"); *Carhart v. Gonzales*, 413 F.3d 791, 802 (8th Cir. 2005) ("If one thing is clear from the record in this case, it is that no consensus exists in the medical community.").[7]

This Court is not obligated to accept a "finding" of medical "consensus" as fact in the face of such clear contrary evidence. As then-Judge Clarence Thomas wrote for the District of Columbia Circuit in 1992:

> We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by "finding" that black is white or freedom, slavery, judicial review would be an elaborate farce.

Lamprecht v. FCC, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992). The clear lack of medical consensus places the Act squarely within the province of *Stenberg*. A health exception is constitutionally required. *Stenberg*, 530 U.S. at 937.

There can be no argument that Congress would find the Act acceptable were a health exception to be added. To the contrary, the Act's sponsors expressed the view that the Act would be devoid of meaning if it contained a health exception. Representative Chabot, the sponsor of the Act in the House, stated:

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[7] *Amici* do not believe that "medical consensus" (which Congress has failed to show even on the record it constructed) is a constitutionally relevant standard. The appropriate test remains that if there is "substantial medical authority" that banning a procedure "could" endanger a woman's health, then a health exception is required. *Stenberg*, 530 U.S. at 938.

> [A] health exception, no matter how narrowly drafted, gives the abortionist unfettered discretion in determining when a partial-birth abortion may be performed. And abortionists have demonstrated that they can justify any abortion on this ground. . . . It is unlikely, then, that a law that includes such an exception as being proposed would ban a single partial-birth abortion or any other late-term abortion.

H.R. Rep. No. 108-58, at 69 (2003); 148 Cong. Rec. H5352, H5356, H5372 (statements of Rep. Chabot); *see also* 149 Cong. Rec. S3560, S3607 (2003) (statement of Sen. Santorum); 149 Cong. Rec. S3560, S3605 (2003) (statement of Sen. DeWine); 149 Cong. Rec. H4922, H4940 (2003) (statement of Rep. Sensenbrenner).

Congress's deliberate rejection of a health exception is further demonstrated by both houses' rejection of amendments that would have added such an exception. Congress and its committees rejected amendments proposing a health exception no fewer than five times. *See* 149 Cong. Rec. S3560, S3580 (2003) (Senate rejecting a motion to commit the Act to the Judiciary Committee with instructions to consider the constitutional issues raised in *Stenberg*, including those relating to a health exception); 149 Cong. Rec. S3608, S3611 (2003) (Senate rejecting amendment that would have added a health exception, among other changes); 149 Cong. Rec. H4922, H4948 (2003) (House rejecting amendment that would have added a health exception, among other changes); 149 Cong. Rec. H4922, H4949 (2003) (House rejecting a motion to recommit the Act to the House Judiciary Committee with instructions to add a health exception); H.R. Rep. No. 108-58, at 71-73 (2003) (House Judiciary Committee rejecting an amendment that would have added a health exception to the Act). These repeated congressional rejections of health exception amendments make clear beyond doubt that Congress intended to enact a "partial-birth" abortion ban with no health exception.

In light of Congress's clear and stated intent to pass an abortion regulation without a health exception, in contravention of the requirements of *Stenberg*, any remedy short of facial invalidation of the entire Act would be inconsistent with the principle recently announced in *Ayotte*. Rewriting the Act to render it constitutional would create a remedy that is not "faithful to [the] legislative intent" of Congress, *Ayotte*, 126 S. Ct. at 969, but, rather, directly contravenes that intent.

2. Judicial rewriting of the statute to fashion a "narrow" remedy by adding a health exception would improperly engage the Court in a legislative function.

Inconsistency with congressional intent is not the only reason the Court should not cure the statutory defect by adding a health exception. Were the Court to imply such an exception, it would be performing a quintessentially legislative task. This Court repeatedly has abjured such a departure from its judicial role, declining to "save" unconstitutional legislation by judicially rewriting it.[8] *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"). The Court has further

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[8] As the Chief Justice memorably expressed the concept at his confirmation hearing:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. . . . I will remember that it's my job to call balls and strikes, and not to pitch or bat.

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recognized that such judicial revision is inappropriate because it would involve a "serious invasion of the legislative domain." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995). That is particularly true here, where Congress deliberately omitted the provisions in question.

Among the reasons that judicial statutory surgeries, such as engrafting a health exception onto the Act, are constitutionally improper is that these remedies require the Court to make policy choices that fall within the province of the legislature. In *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), the Court refused to fashion a narrow remedy to the constitutional deficiencies in certain contribution limitations in the Vermont Campaign Reform Act. *Id.* at 2500 (plurality). The plurality determined that the narrow remedy of severing the unconstitutional provisions from the statute would require the Court to foresee which revisions that the Vermont legislature would choose to repair the constitutional deficiencies in the Campaign Reform Act. *Id.* Recognizing that correcting the constitutional problems in the statute would have required the Court to predict the contours of a possible legislative response, the Court in *Randall* rejected a narrow remedy. *Id.* It instead appropriately determined that the legislature was best suited to rewrite the statute to conform with constitutional requirements. *Id.* ("To sever provisions to avoid constitutional objection here would require us to write words into the statute . . ., or to leave gaping loopholes . . ., or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found.").[9]

Similarly, in *National Treasury Employees Union*, the Court refused to redraft a provision of the Ethics in Government Act when it was unsure which of several potential options Congress would have chosen to cure the

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[9] Concurring opinions did not take issue with this part of the analysis.

constitutional infirmities in the statute's honoraria ban. 513 U.S. at 479 (noting the Court's "obligation to avoid judicial legislation"). Accordingly, the Court left to Congress the quintessentially legislative task of drafting a narrower statute. *Id. See also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (stating that the Court was not at liberty to rewrite a statute using guesswork as to what choices Congress would have made to avoid the constitutional defects).

Just as in these cases, an effort to repair the constitutional defects in the Act would place the Court in the untenable position of predicting the choices Congress would make in order to enact a properly constitutional ban on so-called "partial-birth" abortion. As it did in those cases, the Court should decline any invitation to undertake this kind of legislative guesswork and should leave any redrafting of the Act and the accompanying policy choices to Congress. The only remedy consistent with our well-established system of separation of powers among the three different branches of government is total invalidation.

3. Invalidating the Act would permit Congress to determine whether it would prefer a statute with a health exception or no statute at all.

Facial invalidation of the Act would permit Congress to attempt to revise the Act to remedy its constitutional defects – or, in its discretion, to abandon the effort. Such an iterative process frequently occurs in the wake of judicial decisions invalidating federal statutes.

One modern illustration of such an appropriate iterative process between Congress and the Court involved the evolution of the Communications Decency Act ("CDA") and the Child Online Protection Act ("COPA"). In 1997, the Court struck down the certain provisions of the CDA, finding that the "indecent transmission" and "patently offensive display" provisions were overly vague and violated the free speech provisions of the First Amendment. *Reno v. ACLU*,

521 U.S. 844 (1997). Rather than defying the Court, in direct response to *Reno*, Congress enacted the COPA in order to cure the constitutional flaws in the previous law. Pub. L. No. 105-277, § 1403, 112 Stat. 2461, 2681 (1998); H.R. Rep. No. 105-775, at 5 (1998) (Commerce Committee report stating that COPA was "carefully drafted to respond to the Supreme Court's decision in *Reno v. ACLU* . . . and the Committee believes that this bill strikes the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web.").

In 2002, the Court raised the issue of whether the COPA was overly broad or unconstitutionally vague, vacating and remanding the issues to the Third Circuit. *Ashcroft v. ACLU*, 535 U.S. 564, 564-65 (2002). Congress responded by once again amending the COPA to better conform the language of the act to the Court's decision in both *Reno* and *Ashcroft*. Pub. L. No. 108-21, § 603, 117 Stat. 650, 687 (2003). The Senate made clear that it was once again reacting to the Court's guidance. *See* 149 Cong. Rec. S5137, S5149 (2003) (statement of Sen. Grassley) ("The amendment strikes the indecency provisions, which the court ruled were unconstitutionally vague, and limits the scope of the CDA to obscenity and child pornography, which can be restricted since they do not benefit from [F]irst [A]mendment protection."). The history of the COPA and the CDA is a vivid example of a properly functioning relationship between the judiciary and the legislature.

Congress's response to the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), offers another example. In *Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990, on the grounds that Congress had failed to establish any nexus with interstate commerce sufficient to trigger its authority to regulate firearms possession and local school zones. *Id.* at 567. Congress responded by enacting a new statute that created such a nexus by adding language specifically requiring the federal government to prove that

the firearm "moved in or that otherwise affects interstate or foreign commerce." 18 U.S.C. § 922(q)(2)(A).

Yet another example is provided by the congressional response to *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated the Religious Freedom Restoration Act ("RFRA") as it applied to the states as an improper exercise of Congress's powers under Section 5 of the Fourteenth Amendment. 521 U.S. at 536. Congress enacted a new statute, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), which narrowed the scope of RFRA protections to satisfy the *Boerne* standard. *See* 146 Cong. Rec. S7774, S7775 (2000) (remarks of Sen. Hatch) (explaining why RLUIPA conforms to *Boerne*); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (affirming facial validity of RLUIPA).

In contrast, where Congress has defied constitutionality rulings by the Court, the Court has continued to enforce the Constitution. For example, in *Texas v. Johnson*, 491 U.S. 397, 420 (1989), the Court held that a conviction for flag desecration under a Texas statute was inconsistent with the First Amendment and affirmed a decision of the Texas Court of Criminal Appeals that barred punishment of defendant for burning the flag as part of a public demonstration. In response, Congress passed the federal Flag Protection Act of 1989. 18 U.S.C. § 700. When the constitutionality of the statute banning flag burning was challenged, the Court did not hesitate to hold the ban unconstitutional. *United States v. Eichman*, 496 U.S. 310 (1990).

The Court should strike down the Act in its entirety and provide Congress with an opportunity, if it should choose to accept it, to draft a law that conforms to constitutional requirements.

B. The Act's Overbreadth Also Requires Facial Invalidation.

Apart from the Act's unconstitutional lack of a health exception, total invalidation of the Act also is required due to

the statute's unconstitutional overbreadth. The Act effectively outlaws abortion procedures that are completely legal and constitutionally protected. As such, the Act creates an undue burden on the exercise of the right to abortion. Under *Casey* and its progeny, such an undue burden is a basis for a complete invalidation of an abortion regulation.[10] *See, e.g., Casey*, 505 U.S. at 879; *Stenberg*, 530 U.S. at 930; *see also Roe*, 410 U.S. at 164 (striking in its entirety law restricting abortion because it "sweeps too broadly").

As explained in detail in the Ninth Circuit's opinion, the Act is overbroad because its definition of prohibited "partial-birth" abortion is imprecise and effectively criminalizes unquestionably legal forms of abortion. *Planned Parenthood Fed'n*, 435 F.3d at 1176. These flaws are identical to those of the Nebraska statute invalidated in *Stenberg* and, as in *Stenberg*, complete facial invalidation is the appropriate remedy. The Court held in *Stenberg* that an abortion ban that failed to differentiate in its statutory language between intact D&E's and non-intact D&E's constituted an undue burden, because it would prohibit most legal, pre-viability second trimester abortions and had to be facially invalidated.[11] *Stenberg*, 530 U.S. at 945.

The Act's overbreadth will have a chilling effect on both women who seek abortions and doctors who perform abortions and would face criminal sanctions if they performed even unambiguously constitutional procedures.

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[10] As confirmed in *Stenberg*, imposing an undue burden is a basis of unconstitutionality distinct from the lack of a health exception. *See Stenberg*, 530 U.S. at 930 (lack of health exception and "undue burden" of Nebraska's "partial birth abortion" ban were "independent reason[s]" the statute was unconstitutional); *see also Ayotte*, 126 S. Ct. at 965.

[11] Just as it did in omitting a health exception, Congress similarly ignored the Court's explicit guidance in *Stenberg* regarding the permissible scope of restrictions on so-called "partial-birth abortions" and problems of unconstitutional overbreadth. *See, e.g.*, 149 Cong. Rec. S3560, S3601 (2003) (statement of Sen. Feinstein); 149 Cong. Rec. H4922, H4934 (2003) (statement of Rep. Conyers).

This "chilling effect" is precisely the reason that the Supreme Court applies a form of the overbreadth doctrine in the abortion context. *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (noting that facial challenges to statutes restricting abortion are permissible because the Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)"); *Casey*, 505 U.S. at 893-94 (invalidating law requiring spousal notice prior to abortion because women who feared their husbands' abuse were "likely to be deterred [by the provision] from procuring an abortion as surely as if the [state] had outlawed abortion in all cases"). In *Casey*, the Court found the chilling effect on women sufficient to render the statute unconstitutional on its face, even though it appeared that the majority of married women informed their husbands before obtaining an abortion. *Id.* Here, as in *Casey*, the overbreadth of the Act will deter at least some women from seeking and obtaining perfectly legal abortions.

The Act also will have a chilling effect on physicians that deters at least some of them from performing legal abortions. As summarized by the Court in *Stenberg*: "All those who perform abortion procedures using [the D&E] method must fear prosecution, conviction, and imprisonment." *Stenberg*, 530 U.S. at 945. The Court concluded that "[t]he result is an undue burden upon a woman's right to make an abortion decision." *Id.* at 946. As with the statute in *Stenberg*, the Act's overly broad language, would create an undue burden on the right to an abortion, and requiring facial invalidation.

It would be inappropriate and beyond the institutional competence of the Court to remedy the overbreadth of the Act by narrow, injunctive means. *See* Section I.A.2, *supra*. Revising the Act to incorporate constitutional limits not intended by Congress would be precisely the kind of judicial "invasion of the legislative domain" assiduously avoided by the Court. *Nat'l Treasury Employees Union*, 513 U.S. at 479 n.26. As the Ninth Circuit recognized, to cure the defects in

the statute would require that this Court "would in effect have to strike the principal substantive provision that is now in the Act and then, akin to writing legislation, adopt new terms with new definitions and new language creating limitations on the Act's scope." *Planned Parenthood Fed'n*, 435 F.3d at 1188. If Congress wants to pass a law that complies with the constitutional requirements identified by this Court and that is not unduly burdensome, it is eminently capable of doing so.

C. The Act's Unconstitutional Vagueness Further Requires Total Invalidation.

Finally, the Act is subject to facial invalidation because it is vague. A law is vague if it fails to give sufficient notice to ordinary citizens of what activity is prohibited and thus leaves open the possibility of arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 60, 64 (1999). The Court demands a higher level of clarity from criminal statutes such as the Act which might infringe upon constitutionally protected activity. *Reno*, 521 U.S. at 871-72. Abortion is a constitutionally protected right and, accordingly, the Act is subject to heightened vagueness review. *Colautti v. Franklin*, 439 U.S. 379, 394 (1979) (invalidating abortion statute because it "conditions potential criminal liability on confusing and ambiguous criteria," and "therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights"), *overruled in part on other grounds*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

As noted by the Ninth Circuit, the Act is unconstitutionally vague. For the same reasons that the Act is overly broad, the Act does not clearly warn medical practitioners subject to the Act what kind of procedures are prohibited. *Planned Parenthood Fed'n*, 435 F.3d at 1332. Several of its statutory terms are undefined and susceptible of several meanings. *Id.* at 1333.

Physicians performing abortions are likely to be chilled by the Act's vagueness. As the district court found, because "Congress did not spell out those procedures which were *not* covered by the law," there are serious ambiguities about whether the statutory prohibition includes commonly used previability procedures such as D&E. *Carhart*, 331 F. Supp. 2d at 1037-40.[12] Tellingly, this Court found the Nebraska statute in *Stenberg* facially invalid for similar reasons. *See Stenberg*, 530 U.S. at 939. Congress's refusal to heed *Stenberg's* requirement for clarity regarding procedures covered by the Act makes it impossible, as the district court correctly found, for physicians to "distinguish between that which is criminal and that which is lawful." *Carhart*, 331 F. Supp. 2d at 1040. The Act therefore renders doctors "subject to prosecution for a federal felony when they had no intention of performing the banned procedure, but the exigencies of the situation forced upon them the necessity of doing something that looked similar to the banned procedure." *Id.* at 1132. *See also Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 469 (7th Cir. 1998) ("When vague statutes prescribe heavy penalties for violation, rational people avoid any conduct that *might* be thought to fall within the statute's scope, even if in an error free litigation the conduct would be sure to be found constitutionally protected.").

The government's "specific intent" limiting construction – that the specific intent necessary to commit the crime must be formulated before the procedure begins *see* Pet'r Br. at 32-33 – does not cure this fatal vagueness problem. Such a construction will not mitigate the chilling effect on doctors. Doctors who are required to make a

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[12] The Congressional Record includes warnings about the vagueness of the Act. 149 Cong. Rec. H4922, H4933 (2003) (statement of Rep. Farr); *id.* at H4934 (statement of Rep. Conyers); 149 Cong. Rec. S3608, S3611-12 (2003) (statement of Sen. Feingold); 149 Cong. Rec. S3560, S3600 (2003) (statement of Sen. Feinstein).

medical decision at the time a woman seeks medical treatment will still run the risk of being criminally charged. That a "specific intent" construction may ultimately make it easier to defend would not affect the possibility of being charged in the first place.

And, in any case, the argument has no merit. Such a construction finds no support in the plain text of the statute and would require this Court to rewrite the statute to include language Congress chose not to include. *See Stenberg*, 530 U.S. at 940-45 (noting that it is not the role of the Court to rewrite a statute and construct limitations that the words of the statute will not reasonably support); *Reno*, 521 U.S. at 884 (narrowing conditions only permissible where statute is "readily susceptible" to such conditions). *See also Am. Booksellers*, 484 U.S. at 397 (same).

Because of the Act's vagueness, it should be invalidated. *See Morales*, 527 U.S. at 64; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Colautti*, 439 U.S. at 394 (affirming facial invalidation of provision of Pennsylvania Abortion Control Act due to vagueness of statutory viability determination); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

II. THE LANGUAGE OF *UNITED STATES v. SALERNO* IS NOT A GENERAL RULE FOR ALL FACIAL CHALLENGES AND SHOULD NOT BE APPLIED IN THIS CASE.

In the companion case of *Gonzales v. Carhart*, the government asserts that "the standard for facial challenges" is that set forth in *United States v. Salerno*, 481 U.S. 739 (1987), and urges the Court to hold that the *Salerno* language, not the test required by *Casey*, applies to facial constitutional challenges to statutes restricting abortion. Cert. Pet. at 18-21, *Carhart*, No. 05-380. Certain states also advocate this position. *See* Amicus Br. of the States of Texas et al. at 19, *Carhart*, No. 05-380.

Salerno involved a facial constitutional challenge to provisions of the Bail Reform Act. Justice Rehnquist, writing for the majority, stated:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Salerno, 481 U.S. at 745.

Despite the government's assertion in *Carhart*, this *Salerno* language is not – and never has been – the generally applicable standard for facial challenges. Rather, as Justice Stevens wrote for a plurality in *Morales*, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is *not* the *Salerno* formulation, which has *never* been the decisive factor in any decision of this Court, including *Salerno* itself." *Id.* at 55 n.22 (Stevens, J., Ginsburg, Souter, JJ. concurring) (emphasis added).[13] *See also Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517

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[13] A careful review of *Salerno* makes clear that the result in that case did not turn on application of the "no set of circumstances" language but, rather, on the Court's conclusion that the Bail Reform Act did not facially violate constitutional norms. *See Salerno*, 481 U.S. at 746 (act does not violate substantive due process because the pretrial detention it authorizes is regulatory, not penal, and is justified by a compelling governmental interest in preventing crime by arrestees); *id.* at 751-52 (Act's procedures, including enumerated criteria, a judicial hearing, a clear and convincing evidence standard, a requirement of written findings of fact, and immediate appellate review, provided "extensive safeguards" sufficient to satisfy the Due Process Clause); *id.* at 752-53 (Act does not violate excessive bail clause of Eighth Amendment).

U.S. 1174, 1175-76 (1996) (mem.) (Stevens, J., denying certiorari) ("[T]he dicta in *Salerno* does not accurately characterize the standard for deciding facial challenges, and neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.") (internal quotation marks and citation omitted).

Applying the standard favored by the government in *Carhart* would dangerously limit constitutional protections, allowing statutes that are unconstitutional in all but one circumstance to remain in effect. It would overturn this Court's well-established law governing facial constitutional challenges under the Free Speech and Free Exercise Clauses and the Due Process Clause. Adopting the *Salerno* language as the rule in all contexts would also sweep away well-established law governing facial constitutional challenges to laws restricting abortion.

Perhaps recognizing that its stance in *Carhart* is radical and unsupportable, the government appears to have retreated from that position. Pet'r Br. at 16, 18 & n.2 (arguing that the Act is constitutional under the *Casey* test and, therefore, the case is not an "appropriate vehicle" to determine whether the *Salerno* language or the *Casey* standard applies to facial challenges to statutes restricting abortion). *See Casey*, 505 U.S. at 895. But the government has not expressly repudiated its position in *Carhart*.

The Court should refuse to adopt the *Salerno* language in this case or its companion case. To do so would establish *Salerno* as the general rule, sweeping away existing precedent, both within and outside the abortion context.

A. The *Salerno* Language Does Not Apply To First Amendment Facial Challenges To Statutes On Grounds Of Overbreadth.

As acknowledged in *Salerno* itself, when a plaintiff challenges a statute on First Amendment overbreadth grounds, the possibility of constitutional application in

certain factual circumstances does not preclude a facial challenge and invalidation of the statute. *See Salerno*, 481 U.S. at 745. Facial invalidation of an overbroad law ensures that the "threat of enforcement" of the law does not chill protected speech. *Reno,* 21 U.S. at 872 (stating "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images"). *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.").

The Court's decisions after *Salerno* confirm that facial constitutional challenges on grounds of overbreadth in violation of the First Amendment may result in invalidation of the challenged statutory provision even if it could be applied constitutionally in some factual circumstances. *See Free Speech Coal.*, 535 U.S. at 255 (holding some provisions of the Child Pornography Protection Act unconstitutionally overbroad because the statute "bann[ed] unprotected speech" as well as "prohibited or chilled" "a substantial amount of protected speech"); *Reno*, 521 U.S. at 882 (holding the statute unconstitutionally overbroad because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another").

B. *Salerno* Is Not Applied To Facial Constitutional Challenges On Grounds Of Vagueness.

Like overbreadth, the vagueness doctrine seeks to prevent potential chilling effects that will deter individuals from exercising their constitutional rights. Applying the *Salerno* language to preclude facial challenges to unconstitutionally vague laws would undermine the protection against this chilling effect afforded by the vagueness doctrine because it would sweep away the standard that a vague law may be invalidated as

unconstitutional "even when it could conceivably have had some valid application." *Kolender*, 461 U.S. at 358 n.8.

In *Morales*, for example, the Court held unconstitutional a vague loitering law, 527 U.S. at 60, but expressly refused to apply *Salerno* as advocated by the dissenters. *See id.* at 77-78 (Scalia, J., dissenting). A majority agreed that the law should be invalidated because "the ordinance does reach a substantial amount of innocent conduct." *Id.* at 60. Because not all of the conduct reached by the statute was innocent, application of the *Salerno dicta* would have protected the statute from facial invalidation.

Three Justices favored an analysis even more at odds with *Salerno*. They concluded that "even if an enactment *does not reach a substantial amount* of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards . . . sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 52 (Stevens, J., Ginsburg, Souter, JJ., concurring) (emphasis added).

C. The *Salerno* Language Is Not Applied To Establishment Clause Challenges.

The Court also has declined to apply *Salerno* in Establishment Clause cases, despite the fact that "[n]o speech will be 'chilled' by the existence of a government policy that might unconstitutionally endorse religion over nonreligion." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, CJ, dissenting). For example, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), taxpayers brought an Establishment Clause challenge against a law that authorized federal grants to organizations providing services related to premarital adolescent sexual relations and pregnancy. Applying the three-part analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), rather than *Salerno*, the Court held that the Act did not, on its face, violate the Establishment Clause. *See Bowen*, 487 U.S. at 598. In his dissent, Justice Blackmun thought it was "worth acknowledging explicitly" that he agreed with the majority's

refusal to use *Salerno* in Establishment Clause cases. *Id.* at 627 n.1 (Blackmun, J., dissenting). He observed that applying *Salerno* would be "wholly incongruous with analysis of an Establishment Clause challenge under *Lemon*," "would render review under the Establishment Clause a nullity," and would be an "artifice" that would "eviscerate[]" the Establishment Clause. *Id.*

Santa Fe Independent School District involved another Establishment Clause facial challenge, to a policy allowing prayers before football games. 530 U.S. at 314. The majority struck down the policy as facially invalid under *Lemon*. *Id.* The Court again refused to apply *Salerno*, despite the dissent's position that exceptions to *Salerno* should be recognized only in overbreadth cases and not in Establishment Clause cases. *Id.* at 318 (Rehnquist, CJ., dissenting). *See also Ingebretsen v. Jackson Pub. Sch. Dist.*, 864 F. Supp. 1473, 1483 (S.D. Miss. 1994) ("the rigid dictates of *Salerno* do not apply in Establishment Clause cases. The Court has stated that facial challenges to laws impacting the Establishment Clause are best analyzed under the *Lemon* test.") (citing *Bowen*, 487 U.S. at 601-02).

D. *Salerno* Also Is Not Applied To Other Types Of Facial Challenges Outside the First Amendment Context.

Other exceptions to *Salerno* have no necessary relation to the First Amendment or overbreadth. Decisions that do not employ *Salerno* in evaluating other types of constitutional challenges further demonstrate that *Salerno* is not the general rule.

1. Due Process Or Equal Protection

The *Salerno* language has not been applied in substantive due process cases. In addition to cases challenging laws restricting abortion, *see* Section II.E, *infra*, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court held unconstitutional an amendment to Colorado's state constitution that would have prohibited any state or local

government action that would have protected homosexuals against discrimination. *Id.* at 623. Justice Scalia dissented arguing that this holding was inconsistent with *Salerno* because there were some circumstances under which the amendment could have been constitutionally applied; at the time (prior to *Lawrence v. Texas*, 539 U.S. 558 (2003)), it was permissible to criminalize sodomy. *Id.* at 642-43 (Scalia, J., dissenting).

The Court also declined to rely on *Salerno* in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Respondents argued that a statute banning assisted suicide was facially invalid under the Due Process clause because it violated Fourteenth Amendment liberty interests. *Id.* at 707-08. Although the Court reversed the lower courts' decisions that the statute was unconstitutional, *id.* at 705-06, the majority opinion did not question "[t]he District Court determin[ation] that *Casey*'s 'undue burden' standard, not the standard from *United States v. Salerno* (requiring a showing that 'no set of circumstances exists under which the [law] would be valid'), governed the plaintiffs' facial challenge to the assisted-suicide ban." *Id.* at 708 n.5 (citation omitted). Moreover, Justice Stevens, concurring, stated that "[t]he appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court," and he stated that he "believe[d] the Court has [n]ever actually applied such a strict standard, even in

Salerno itself, and the Court does not appear to apply *Salerno* here."[14] *Id.* at 739-40 (Stevens, J., concurring).

2. Foreign Commerce Clause

The Court also declined to apply *Salerno* in determining whether an Iowa tax scheme that taxed dividends received from foreign, but not domestic, subsidiaries violated the Foreign Commerce Clause. *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 72-73 (1992). Over the dissent's objection that *Salerno* should have been applied, *id.* at 82-83, the Court concluded that the statute facially discriminated against foreign commerce and therefore violated the Foreign Commerce Clause. *Id.* at 82; *see also Caterpillar, Inc. v. Comm'r of Revenue*, 568 N.W.2d 695, 700 n.8 (Minn. 1997).

3. Enforcement Of The Fourteenth Amendment

Finally, *Salerno* is in tension with a line of cases analyzing constitutional challenges to statutes passed by Congress, pursuant to Section 5 of the Fourteenth Amendment, to protect citizens against potential unconstitutional state action. The Court has held the statutes unconstitutional even where some of the conduct they

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[14] *Reno v. Flores*, 507 U.S. 292 (1993), which cited *Salerno* in its due process analysis, is not to the contrary. In *Flores*, the Court rejected the substantive due process claim, finding that the case involved no "fundamental rights." *Id.* at 305. Nor was the *Salerno* language necessary to the due process holding because far from there being no set of circumstances in which the statute was *constitutional* as required by *Salerno*, the Court expressed skepticism that there would be very many circumstances - if any - in which it would be *unconstitutional*. *Id.* at 309. *See also Caplin & Drysdale v. United States*, 491 U.S. 617, 634 (1989) (*Salerno* cited in rejection of as-applied challenge to forfeiture statute noting that defendant made no direct allegation of prosecutorial abuse and unconstitutionality "under some conceivable set of circumstances" is not a sufficient showing). Neither case has been subsequently cited as supporting the application of the *Salerno* language.

prohibited was unconstitutional and therefore within Congress's power to prohibit. For example, in *City of Boerne*, *supra*, the Court facially invalidated the Religious Freedom Restoration Act ("RFRA"). 521 U.S. at 511. RFRA was supposed to ensure that state laws did not infringe the Establishment Clause. *See id.* at 515-16. Applying the *Salerno* language, the Court would have had to find that there could have been no constitutional application of the statute. *Salerno*, 481 U.S. at 745. Instead, the Court invalidated RFRA because it was inappropriate "[i]n most cases." *City of Boerne*, 521 U.S. at 535. The Court articulated a far a less stringent standard than *Salerno*: "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that *many of the laws* affected by the congressional enactment have a *significant likelihood* of being unconstitutional." *Id.* at 532 (emphasis added). *See also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (failing to apply *Salerno* in striking down a law that prohibited states from using age as a discriminating factor because the law "prohibits very little conduct likely to be held unconstitutional"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (striking down the Patent Remedy Act even though it would have remedied some state constitutional violations).

E. The Salerno Language Is Not, And Should Not Be, Applied To Facial Constitutional Challenges To Laws Restricting Abortion.

Consistent with the Court's refusal to apply *Salerno* to cases involving fundamental due process rights, and vague or overbroad laws, the Court similarly has declined to apply the "no set of circumstances" language to laws restricting abortion. Indeed in *Casey* the Court made clear that a statute that unduly burdens the right of privacy inherent in a woman's right to choose is subject to facial invalidation without application of *Salerno*. *See, e.g., Stenberg*, 530 U.S. at 930; *Casey*, 505 U.S. at 895 (facially invalidating statutory

provision that unduly burdened a woman's right to an abortion without applying *Salerno*).

In *Stenberg*, the Court built upon its nearly decade-old decision in *Casey* when it held that a Nebraska statute criminalizing so-called "partial-birth" abortions violated a woman's right to privacy.[15] 530 U.S. at 921. As in *Casey*, *Salerno* was not a factor in *Stenberg*, nor was it even mentioned in passing. Instead, the Court upheld a facial challenge to a Nebraska abortion statute under the *Casey* undue burden standard. In particular, the Court found that the statute: (1) lacked a "health exception" for circumstances where the abortion would be necessary to preserve the health of the woman and (2) imposed an undue burden on a woman's ability to make an abortion decision where doctors feared prosecution, conviction, and imprisonment. *Id.* at 945-46. Rejecting Nebraska's claim that a health exception was not necessary, the Court found that *Casey* requires a health exception when an abortion procedure is necessary to the preserve the life or health of the woman. *Id.* at 938 (stating that health exception was "no departure from *Casey*, but simply a straightforward application of its holding"); *see also Ayotte*, 126 S. Ct. at 965-66 (vacating and remanding on remedy alone, without disputing the First Circuit's reliance on the "undue burden" standard in holding unconstitutional a statute restricting abortion).

All but one of the Circuits that have considered this question agree that *Casey* and *Stenberg*, not the *Salerno*

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[15] The right to abortion is rooted in privacy rights emanating from, *inter alia*, the First, Fifth and Fourteenth Amendments. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . .Various guarantees create zones of privacy.") (citation omitted); *Roe*, 410 U.S. at 129, 152-53 (relying in part on *Griswold* to find that the right to an abortion is a privacy right based on various constitutional amendments). As noted above, the Court repeatedly has declined to apply *Salerno* to challenges arising under the First Amendment and the Due Process clause.

language, provide the appropriate standard for determining the facial constitutionality of a statute restricting abortion. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 n.9 (9th Cir. 2004) (noting that "[a] majority of the circuits now agree that *Casey* effectively precludes the application of *Salerno* in abortion cases"); *Nat'l Abortion Fed'n*, 437 F.3d at 294 ("at least 'seven circuits have concluded that *Salerno* does not govern facial challenges to abortion regulations'") (Walker, J., concurring) (citation omitted); *see also Carhart*, 413 F.3d at 794-95 (refusing to apply *Salerno*); *Planned Parenthood of the Rocky Mountains Servs., Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) (reviewing constitutionality of abortion statute under *Stenberg* without considering *Salerno* language); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142 (3d Cir. 2000) ("several courts, including our own, have noted [that] the *Casey* Court muted the *Salerno* requirement in the abortion context"). And even the outlying Fifth Circuit has had conflicting holdings. *Compare Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (holding *Casey* did not overrule *Salerno*) *to Sojourner T v. Edwards*, 974 F.2d 27 (5th Cir. 1992) (striking down a statute under *Casey*, although it would arguably be valid under *Salerno*).

Wholly apart from the binding long-established precedent of *Casey* and *Stenberg*, *Salerno* does not apply because the Act falls into *Salerno's* overbreadth exception. Although in *Salerno* the Court articulated an exception only for First Amendment overbreadth challenges, since then the Court has "recognized the validity of facial attacks alleging overbreadth" in the abortion context. *See Sabri*, 541 U.S. at 609-10 (citation omitted).

F. All Of These Examples Illustrate That *Salerno* Is Not The General Rule.

Thus, the Court has declined to apply the *Salerno* language to a variety of facial constitutional challenges. Were the Court to determine that *Salerno* should now be the

default standard for facial challenges, including facial challenges regarding the constitutionality of laws restricting abortion, it would effectively overrule numerous decisions involving a wide variety of constitutional challenges. We urge the Court to decline the invitation to engage in such a wholesale revision of constitutional litigation standards. Were the Court to do so, it would effectively insulate from challenge laws with broad unconstitutional impact only because, in at least one conceivable circumstance, they might not have such an impact.

CONCLUSION

In adopting the Partial-Birth Abortion Ban Act, Congress threw down the gauntlet to the Court by enacting a ban on abortions that does not comply with the constitutional requirements articulated by the Court in *Casey* and *Stenberg*. Having done so, Congress necessarily assumed the risk of the consequences of its decision: a judicial declaration that, on its face, the Act is unconstitutional. *Amici* respectfully submit that, in these circumstances, the only appropriate course is for the Court to reaffirm its prior precedent and issue such a declaration.

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